BRB No. 97-0517

LAURENT GIGUERE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATED ISSUED: _____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United Sates Department of Labor.

Janmarie Toker (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-778) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C.§901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 13, 1992, claimant sustained a right knee injury while working for employer as a welder/pipefitter when he fell through a ship's hatchway door after slipping on an icy deck. Dr. Herzog, an orthopedist, diagnosed a possible tear of the medial meniscus and contusion with synovitis, and placed claimant on light duty work with restrictions regarding squatting, kneeling, and climbing stairs. After several weeks of conservative treatment failed to alleviate claimant's condition, Dr. Herzog performed surgery to repair the torn medial meniscus. Two and one-half weeks later, claimant returned to light duty bench work. Although his knee continued to swell, he remained in this

position until October 1992, at which time his new treating physician, Dr. Solari, took him off work. Thereafter, on January 19, 1993, claimant underwent a second arthroscopic procedure. On February 11, 1993, Dr. Solari released claimant to return to light duty work; initially, he limited him to work sitting down, but later only precluded him from work involving squatting, kneeling, or climbing. Two months later, claimant began working at employer's Bath facility in an alternative work program, but, consistent with company policy, he was only able to work there for 90 days. Claimant remained out of work until January 1995, when he was offered a prefabrication job with employer within his limitations.

Claimant alleged that his knee injury caused him to walk with an altered gait which aggravated a pre-existing back condition for which he had previously required surgery in 1976 and 1978.[1] Claimant sought temporary total disability benefits under the Act from February 13, 1992, until January 13, 1995, with the exception of the periods when he was employed, and medical expenses. Employer conceded that claimant suffered a work-related knee injury, but argued that his back injury is not work-related.

In his Decision and Order, after finding that claimant's back injury was not work-related, the administrative law judge awarded him temporary partial disability benefits for his right knee injury for the periods between February 12, 1993 and January 13, 1995 when he was not employed based on the difference between his stipulated average weekly wage of $503.55 and his post-injury wage-earning capacity of $6 per hour or $240 per week, as established by Mr. Mazzaro's vocational testimony. On appeal, claimant argues that the administrative law judge erred in finding that his back condition was not a compensable sequela of an altered gait due to his work-related right knee injury, and in determining that Mr. Mazzaro's testimony provided substantial evidence to establish the availability of suitable alternate employment. In the alternative, claimant avers that even if employer established suitable alternate employment, he is still entitled to temporary total disability compensation for the period claimed because despite the exercise of due diligence, he was unable to secure suitable alternate work. Finally, claimant argues that at the very least he is entitled to temporary total disability benefits during the periods he was medically incapacitated from performing any work. Employer responds, urging affirmance.

Initially, we affirm the administrative law judge's finding that claimant's back injury is not a compensable sequela of his altered gait due to his February 1992 work-related knee injury. Section 20(a) provides claimant with a presumption that his condition is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the ultimate disability. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Merrill v. Todd Pacific Shipyards Corp.*, 25

[1]Claimant sought and was awarded temporary total and permanent partial disability benefits under the Maine Act.

BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if causation has been established. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

In the present case, the administrative law judge found that claimant was entitled to the Section 20(a) presumption and that it was rebutted based on the testimony of Dr. Klein. Weighing the evidence as a whole, the administrative law judge determined that claimant failed to carry his burden of persuasion. The administrative law judge reasoned that the opinion of his treating chiropractor, Dr. Malon, which related claimant's back complaints to his altered gait, was outweighed by the contrary testimony of Dr. Klein, a neurologist, whom the administrative law judge found was better qualified to offer such an opinion. In addition, the administrative law judge relied on negative evidence; he noted that claimant did not complain of back pain to Drs. Herzog or Solari, who had been treating his knee, and did not resume treatment with a chiropractor until April 1994, almost 2 years after his knee injury. Although claimant argues on appeal that the administrative law judge erred in crediting employer's physician, Dr. Klein, over claimant's treating chiropractic physician, Dr. Malon, such determinations are solely within the administrative law judge's discretionary authority. Inasmuch as his decision to credit Dr. Klein's opinion over Dr. Malon's based on his superior credentials as a neurologist is rational, we affirm this determination.[2] *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Dr. Klein's opinion that there is no connection between claimant's February 1992 work-related knee injury and his intermittent back pain, in conjunction with the negative evidence relied upon by the administrative law judge, provides substantial evidence to support his finding that claimant's back condition is not due to an altered gait resulting from

[2]The administrative law judge also found that Dr. Klein's opinion was better reasoned than that provided by Dr. Malon because Dr. Malon failed to address the possible relationship between claimant's prior back surgeries and his current complaints, the length of time that had elapsed between claimant's right knee injury and the onset of his back symptoms, and the relationship, if any, between his findings of degenerative disc disease and posterior joint dysfunction and claimant's back pain. Decision and Order at 6.

his February 1992 knee injury. *See Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.). As claimant has failed to demonstrate any reversible error made by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, we affirm this determination. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Claimant also argues that the administrative law judge erred in denying his claim for temporary total disability benefits. Specifically, claimant argues that in finding that employer met its burden of establishing the availability of suitable alternate employment, the administrative law judge acted irrationally in selectively crediting some of the jobs identified by Mr. Mazzaro, while at the same time rejecting others. Claimant also argues that the jobs the administrative law judge ultimately found suitable exceed his 15-pound lifting restriction and are incompatible with his work experience as a manual laborer. Claimant argues that the administrative law judge committed error in his application of the standard enunciated *Air America v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), including finding that employer's burden of establishing suitable alternate employment was reduced based on the fact that claimant was intelligent and had worked worldwide.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, claimant has established that he is unable to resume his usual employment duties with employer, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment which claimant, by virtue of his age, education, vocational history, and physical restrictions, is capable of performing. *See Air America* 597 F.2d at 773, 10 BRBS at 505; *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986).

In *Air America*, the United States Court of Appeals for the First Circuit, within whose jurisdiction this case arises, stated that the strength of the presumption of total disability, and hence the severity of the employer's burden to overcome the presumption, should reflect the reality of the situation. The court determined that, depending on the situation, employer may not have the heavy burden of establishing actual job opportunities. The court, however, also recognized that it is reasonable to require employer to prove the availability of specific suitable alternate jobs when an employee's inability to perform any work seems probable in light of the employee's physical condition and other circumstances, such as employee's age, education, and work experience. In *Air America*, the court determined that the employer was not required to establish actual available suitable alternate job opportunities to defeat the claimant's *prima facie* case of total disability where the claimant was a 54 year old college-educated airplane pilot who was qualified and had prior experience in a variety of desk positions, having worked previously performing both brokerage and personnel work.

In this case, we affirm the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment based on Mr. Mazzaro's vocational testimony because it is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. Claimant correctly argues that, as he is a 47 year old high school graduate whose only work experience is as a manual laborer, the facts in this case are more similar to those in *Dantes v. Western Foundation Corporation Ass'n,* 10 BRBS 541 (1979), than they are to those in *Air America.* In *Dantes*, the Board declined to follow *Air America* in the case of a 64 year old employee with a high school education who had worked his entire life as a marine carpenter and had no other qualifications. Nonetheless, we conclude that any error the administrative law judge may have made in this case regarding the application of *Air America* is harmless on the facts presented because the vocational testimony of Mr. Mazzaro, which he credited, provides substantial evidence to establish the availability of specific suitable alternate job opportunities.

After reviewing claimant's work history, education, a previously prepared transferable skills analysis, the results of a General Aptitude Battery Test, and the physical restrictions imposed by Drs. Solari and Barrett and the Saco Bay Orthopedic Associates which limited claimant to no lifting in excess of 15 pounds and occasional standing, walking and stair climbing, Mr. Mazzaro determined that claimant was capable of performing a number of jobs which were basically sedentary. Thereafter, he identified a number of actual available job opportunities from the newspaper which he considered to be suitable for claimant, including positions for an apprentice cabinet maker, production supervisor of an optic communication system, inspections officer, municipal piping sales coordinator, flagger/security guard, heavy-medium truck sales representative, golf course maintenance person, maintenance technician, Hertz Counter sales representative, fork lift operator, and heavy truck assistance service manager. Although Mr. Mazzaro did not contact the prospective employers directly, he testified that he was aware of the requirements of the specific jobs based on their descriptions in the Dictionary of Occupational Titles (DOT), his personal placement of individuals in similar positions previously, and his own work experience in similar occupations. Moreover, based on an earlier labor market survey identifying similar available job opportunities, Mr. Mazzaro testified that the market for such employment had been stable since 1992.

After considering Mr. Mazzaro's testimony, the administrative law judge rejected the flagger and building inspector positions as exceeding claimant's restrictions. He then found that of the remaining full-time jobs identified which appeared to be within his restrictions, salary information had only been provided for the Hertz Counter sales representative ($5.50/hr.), gas station attendant ($5.50/hr.), Ryder Truck rental representative ($6.25/hr. plus commission), security officer ($6.00-$6.25/hr.) and parking garage cashier ($7.25/hr.). Averaging the wages paid in those jobs, the administrative law judge determined that claimant had a post-injury wage-earning capacity of $6 per hour or $240 per week. Contrary to claimant's assertions, the administrative law judge rationally found the credited jobs to be suitable based on Mr. Mazzaro's testimony. Moreover, he acted within his discretionary authority in crediting some of the jobs identified by Mr.

Mazzaro, while finding that others exceeded claimant's restrictions, as the trier-of-fact is free to accept or reject all or any part of any testimony according to his judgement. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Inasmuch as the vocational testimony of Mr. Mazzaro provides substantial evidence to support the administrative law judge's finding that employer established the availability of suitable alternate employment and claimant has failed to establish any reversible error, we affirm that determination. *See generally Mendoza v. Marine Personnel Co., Inc.* 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Claimant's due diligence argument similarly must fail. A claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to permanent total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See Rogers Terminal and Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). In the present case, however, based on testimony claimant provided in the Maine State proceedings, EX-24, the administrative law judge rationally found that claimant's job search, which consisted largely of going back to the same few places which he knew were not hiring up to 10 times each, was half-hearted at best ,and therefore insufficient to sustain claimant's burden. *See* Decision and Order at 8. As this finding is rational and supported by substantial evidence, it is affirmed. *See generally Fox w. West State, Inc.,* 31 BRBS 118 (1997).

Claimant correctly argues, however, that during the period in which he sought temporary total disability compensation, there were times when he was precluded from working at all, such as when he was recuperating from surgery in 1992. Although claimant sought temporary total disability benefits dating back to February 12, 1992, which included two periods during which claimant was recovering from surgery and time when his doctor took him off work, the administrative law judge did not address the period of time prior to February 12, 1993, when Dr. Solari released claimant to return to light duty work following his second surgery. Inasmuch as the administrative law judge did not address claimant's entitlement to the compensation claimed between February 12, 1992, and February 12, 1993, the case is remanded to allow him to make this determination.

Accordingly, the case is remanded for consideration of claimant's entitlement to compensation from February 12, 1992, to February 12, 1993. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge